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No. 759.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

JAMES H. MASON and ALTA MASON,
Appellants,

vs.

MIDWESTERN GAS TRANSMISSION COMPANY,
a Corporation,
Appellee.

On Appeal from the Supreme Court of the State of Illinois.

BRIEF

Of Appellants in Opposition to Motion to Dismiss.

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Of Appellants in Opposition to Motion to Dismiss.

Pursuant to Rule 16 (3) of the Revised Rules of this Court, Appellants file this brief in opposition to the motion of Appellee to dismiss.

STATEMENT OF FACTS.

The Appellee has misinterpreted the facts. Appellee states that this appeal is from a judgment awarding compensation. This is a misunderstanding, the appeal is only from that portion of the judgment which awards no compensation for the thing taken being exclusive easement rights for underground gas storage in a particular strata of rocks.

Appellee also states that the issue before this Court is the propriety of the exclusion of certain evidence of value. This is a misunderstanding, the issue is as to the propriety of a court excluding all evidence of value.

Appellee also states that the Appellants had the right to appeal the order of the Illinois Commerce Commission. This is totally irrelevant because that commission did not have the power to fix compensation, nor did it.

Appellee infers that Appellants introduced evidence on a before and after basis as to the whole farm. This is a misunderstanding, the Appellants introduced such evidence only after excluding the value of the strata for the underground storage of gas (Abs. 128, 136). The only evidence which the court allowed the jury to hear as to the value of the thing taken was that of Appellants and their two experts testified that they had no background or knowledge in regard to underground gas storage (Abs. 116, 122). And, Appellant's own witness testified that the only value of the thing taken was for the underground storage of natural gas (Abs. 125).

Appellee states that Appellants attempted to introduce evidence as to the value of the whole dome but fails to state that Appellants also attempted to introduce evidence of a comparable sale (Abs. 134, 135).

Appellee recites the jury verdict but fails to state that the only appeal is from the verdict of "no dollars" for the shale and limestone strata taken for the permanent easement for which no compensation was awarded to the Appellants.

ARGUMENT.

The Excluded Testimony.

This appeal is based upon the failure of the court below to award any compensation to the landowners for the thing actually taken—the exclusive, perpetual right to store gas in a rock strata 1000 feet below the surface of the 107 acre farm of the Appellants. As stated by the Appellee at page 5 of its brief, the court excluded all evidence offered by the Appellants of the value of this strata. The evidence included the testimony of these men:

Eskil J. Bjork, former President and Chairman of the Board of Peoples Gas Light and Coke Company, of Chicago, that (Abs. 71-72): "There have been no sales of underground gas storage strata comparable to the property which Midwestern Gas Transmission Company is seeking to condemn in the Mason land in the Elbridge dome in Edgar County, Illinois . . . He knows of no use which can be made of the sub-surface dome structure which Plaintiff seeks to acquire in the Elbridge area, other than for the storage of natural gas . . . The discovery of the Elbridge dome together with the geological work in connection with that discovery had the effect of increasing the value of the land which included the dome . . . There are several companies in Illinois that would have an interest in purchasing the Elbridge dome structure at its present stage of development."

Allen Van Wyck, President of Illinois Power Company for over twenty years, that (Abs. 74): "He knows of no sales of underground gas storage areas or domes in the State of Illinois . . . If an underground gas storage area were available for purchase, his company would be interested in examining it."

Carl Sherman, a petroleum engineer employed by the State of Illinois with the Illinois Geological Survey, that (Abs. 75): "In 1959, there were about 15 to 20,000 acres involved in a water flood operation, and the total acreage involved in water flood operation in Illinois in 1959, was 140,000 and the largest single operation under water flood was the Salem project, which had a surface acreage of about 7800 acres and this surface consisted mainly of small farms with a large number of landowners involved . . . The power of Eminent Domain was not used to get the landowners together, but this operation was accomplished by the voluntary agreement of all of the landowners."

Emery A. Manlove, Vice-President in charge of operations for Peoples Gas Light and Coke Company, that (Abs. 75-76): "He knows of no scale or measuring device used in the industry for valuing an underground storage facility . . . It is simply a matter of judgment as to the value of an underground gas storage facility . . . The exploratory activities in a search for underground gas storage are being conducted in Illinois by the Peoples Gas Light and Coke Company, Northern Illinois Gas Company and Panhandle and Eastern Pipeline companies."

Ambrose Harbert, Vice-President of City National Bank of Centralia, Illinois, that (Abs. 77): "If his bank were asked to make a loan for the development of an underground gas storage dome, they will not attempt to appraise it, but would go to a geologist and get his reports. . . . Appraisals by a firm such as Oliver & West, Inc., are the criteria of value in the industry, and the firm of Oliver & West, Inc., of Dallas, Texas, is considered qualified in the appraisal field."

Donald Flanagan and William Frank West, petroleum engineers with Oliver & West, Inc., of Dallas, Texas, that (Abs. 79-80): "Upon being furnished with the basic geological data, such as the report of the Illinois Geo-

logical Survey, the United States Geological Survey information, the data presented in the Illinois Commerce Commission hearing in this cause, and data he would acquire by independent examination and study, he could become familiar with the Mason property in such a way as to estimate the value of the underground gas storage rights in the Mason property, much as he became familiar with the Buckles property as indicated in the report which is made a part of this offer as Exhibit A (Abs. 85-108) and could produce the information and the appraisal of value of the type attached to this offer of proof as Exhibit A and entitled 'Appraisal of Gas Storage Value (St. Peter sandstone), Mahomet Dome, Champaign County, Illinois'. . . . Based upon his background experience and familiarity with the Mason property, he would have an opinion based upon a reasonable degree of scientific certainty as to its highest and best use on October 25, 1962, and it would be his opinion that the highest and best use of the Mason property is for the underground shortage (storage) of natural gas. . . . His opinion as to the fair market value of the Mason land before the taking would be the value of the land for farm purposes, plus the value of the underground gas storage rights plus the value of the mineral rights and the value of the land after the taking would be the fair market value of the land for farm purposes plus the value of the mineral rights, less any depreciation in each of those values by reason of the underground gas storage use. . . . . He has had extensive experience in getting together many landowners on a voluntary basis to work together on a project, due to the fact that there is no compulsory unitization in Texas and in order to conserve natural resources by unitization, it has meant getting together all of the landowners in a particular area on a voluntary or cooperative basis and this has been done repeatedly by his firm in projects involving large numbers

of owners and it is his opinion that there would be a minimum of difficulty in securing the voluntary cooperation of all of the landowners providing a fair approach is made to valuation. . . . If the plaintiff in this proceeding were not interested in the Elbridge formation, there would be a demand by others for the facilities provided by this formation. . . . The use that is being made of the surface has no relationship to the value of the underground gas storage area. . . . An appraisal of the type referred to above, is the engineering approach to the valuation of reservoirs of the type of the Elbridge dome and is commonly used in all appraisal work of this type."

Donald Flanagan and Carl Sherman, that (Abs. 81-82): "There is no underground gas storage facility which has been developed in the State of Illinois prior to the enactment of the Underground Gas Storage Act in Chapter 104, Sections 104-112, inclusive, Ill. Rev. Stat. 1961. . . . That outside of the State of Illinois and in the states where there is no power of Eminent Domain, there have been a number of voluntary sales and purchases of easement rights for gas storage purposes by persons to corporations desiring to utilize underground strata for gas storage purposes and that these sales outside the State of Illinois of easement rights, are comparable to the rights being acquired here."

C. Oscar Berry, Vice-President and General Counsel of Washington Gas Light Company of Washington, D. C., testified that (Abs. 83) without the power of eminent domain his company has acquired the rights for an underground gas storage operation, and (Abs. 84) "In 1961 the company made a further change increasing the outright purchase price of the easement from $50.00 per acre to $100.00 per acre in addition to the bonus payment of $300.00 per landowner."

It is our position that the exclusion of this evidence was error and it was an error which this court should correct because it is all of the evidence and the only evidence available to prove value and to deny its admissibility is to deny the landowners compensation. If there were any other evidence of value, the Appellee would have produced it. Under Illinois law "in eminent domain proceedings the burden is on the petitioner to prove the fair cash market value of the property to be taken. . . ." I. L. P., Eminent Domain, § 120, and the Appellee introduced only the evidence of no value by men who acknowledged no knowledge. If these easement rights had, in fact, no value, why does the Appellee seek them? Why does the evidence offered show that competing companies are interested in purchasing them? Why are able petroleum engineers willing to risk their reputations in giving an appraisal of this value on the open market?

The Illinois Gas Storage Act Is Unconstitutional.

The Appellants maintain that the failure to award compensation to the landowners is unconstitutional because it violates due process. Whether this failure is because of an unconstitutional interpretation of the Illinois Gas Storage Act (J. S. p. 26) or because of arbitrary and unreasonable evidentiary rulings is immaterial in judging the wrong to the landowners.

If the court based its rulings on the fact that the Appellee had secured an order from the Illinois Commerce Commission and therefore it was unlikely that anyone else could secure such an order, then the Illinois Gas Storage Act is unconstitutional not as it is written but as it is interpreted by the court. This interpretation grants the exclusive right to condemn which means that the landowner lost something when the order was entered and he lost something without a forum to assert his right to com-

pensation. A statute which is construed to establish a "single bidder" rule resulting in the rejection of evidence by all others, amounts to a clear taking of property without compensation. In **Pennsylvania Coal Company v. Mahon**, 260 U. S. 393, where a coal company had sold the surface of land but reserved an exclusive right to mine under it irrespective of damages caused, and such mining was thereafter forbidden by a Pennsylvania statute, the court stated at page 414:

> "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."

That is true here if the purchase is limited to a single person. The court then went on to say, at page 415:

> "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Perhaps the closest case to the legal situation here propounded was **Grand River Dam Authority v. Grand-Hydro**, 335 U. S. 359, where the court quoted the Oklahoma Supreme Court at page 369:

> "The state cannot, through its law-making body, remove the principal value of private property and, through its established agency acquire the property by condemnation, fixing the reimbursement to the owner on the reduced value."

An Award of "No Dollars" Raises a Substantial Federal Question.

The Appellee says that the sole question is as to the adequacy of the compensation and this raises no substantial Federal question. Our compensation is not inadequate, it is non-existent.

The cases cited by the Appellee on the proposition that there is no Federal question in mere inadequacy of compensation, **McGowen v. City of New York**, 229 U. S. 363, and **Roberts v. New York City**, 295 U. S. 264, are both cases where it would appear that the court would have granted relief if this case had been under consideration. At page 371 of the McGowen case the court said:

> "The final judgment of a state court ought not to be held in violation of the due process of law enjoined by the Fourteenth Amendment unless by the rulings upon questions of law the company was prevented from obtaining substantially any compensation."

And, in the other case cited on this point by the Appellee, **Roberts v. New York City**, 295 U. S. 264, 277, the court says:

> "To bring about a taking without due process of law by force of such judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action."

We submit that rulings preventing any appraisal of the property taken for the only purpose for which it can be used resulting in a judgment of no compensation for the thing taken are gross, obvious and arbitrary.

Comparable Sale Valuation.

The landowners, in offering evidence as to just compensation, used two theories of valuation—comparable sales and net income.

The comparable sales technique was difficult because there have been no sales in II. . . except under threat of condemnation. The Appellants did find voluntary sales of underground gas storage rights in Maryland

which were comparable and offered evidence thereof which the court refused to admit. The Court therefore found, as a matter of law, that the sales were not comparable. The Appellee apparently overlooked this offer in stating that the theory of the landowners on valuation was dependent on the combination of parcels.

Net Income Valuation.

The other theory of valuation by the landowners depended on the combination of the parcels and the Appellee would interpret the court's decision as finding that as a matter of law there could be no combination of the 3200 acres involved. If this is the reasoning of the court in denying any compensation to the landowner then the ruling is contrary to every case the Supreme Court has decided on this subject including those cited by the Appellee.

In the first place the Appellee is ignoring the fact that with this decision the 3200 acres is combined. The thing that the court said as a matter of law could not be done, has been done.

Let us assume that the Appellee meant to say that, absent the power of eminent domain, the 3200 acres could not be combined. Normally this court will not overrule a state court on a matter of evidence relating to the adequacy of compensation but this ruling meant not that the landowners received inadequate compensation but that the landowners received nothing.

The cases on combination cited by the Appellee do not say that as a matter of law the possibility of combination of 3200 acres is so remote as to make evidence of value based on that hypothesis conjectural, but, to the contrary, say that there must be a reasonable probability of the

lands in question being combined. Our case is quite similar to **McCandless v. U. S.**, 298 U. S. 342, 345, where the offer of proof was almost identical to the offer of proof in this case, and this court held that "to exclude from the consideration of the jury evidence of this elementary character could not be otherwise than prejudicial."

The case most commonly cited on both sides of this question is **Olson v. United States**, 292 U. S. 246. In that case, the court declared at page 256:

> "The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably sufficient to affect market value. . . . It is common knowledge that public service corporations and others having that power (eminent domain) frequently are actual or potential competitors, not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account."

As to the admission of evidence on a net income theory where no other evidence is available, the Supreme Court in **Kimball Laundry Co. v. U. S.**, 338 U. S. 1, 5, said:

> "But where the property is of a kind seldom exchanged, it has no 'market price', and then recourse must be had to other means of ascertaining value."

A conflict in the state jurisdictions as to the law is of importance to this court in determining whether to exercise its discretion in allowing briefs to be filed. In **The**

United Fuel Gas Co. v. Allen case, 137 W. Va. 897 (1953), an important question was the market value of the Big Lime formation and the court admitted evidence as to the present market value of the lease saying, page 921:

> "Though the storage acreage upon which the witnesses computed the value is not in the vicinity of the Allen tract, the uniformity of underground formations suitable for gas storage purposes renders the testimony of these witnesses admissible."

The Illinois court excluded evidence of value of similar gas storage easement rights on the ground that this evidence was too speculative. The problem of valuation was also presented in **Milby v. Louisville Gas & Electric Co.**, 375 S. W. 2d 237 (Ky. 1964), and the court distinguished **Peoples Gas Light & Coke Co. v. Buckles**, 24 Ill. 2d 520 (1962), on the sole ground that the West Virginia court interpreted that case as holding that the only person who could use the underground gas storage space was the condemnor as no other gas supplier or pipeline company was competing. The court recognized the constitutional question when it stated at page 240:

> ". . . the mere fact that the particular condemnor has succeeded in obtaining control of most of a particular field and thus has created a situation in which no other public service corporation would have any use for the individual tract sought to be condemned, should not preclude the assignment of a market value to the lease rights in the tract sought to be condemned, in accordance with the rental prices paid for leases of other comparable rights. **Any other view would enable the condemnor to obtain parts of a storage field for nothing**, even though the field as a whole would have a substantial value on a competitive market." (Emphasis added.)

CONCLUSION.

Either the appeal should be allowed because of the unconstitutional interpretation of the Illinois Gas Storage Act by the Illinois court or certiorari should be granted because of the gross and obvious error of the lower court in excluding evidence of compensation.

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